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In the Supreme Court of the United States

OCTOBER TERM, 1987

GENERAL ELECTRIC CO., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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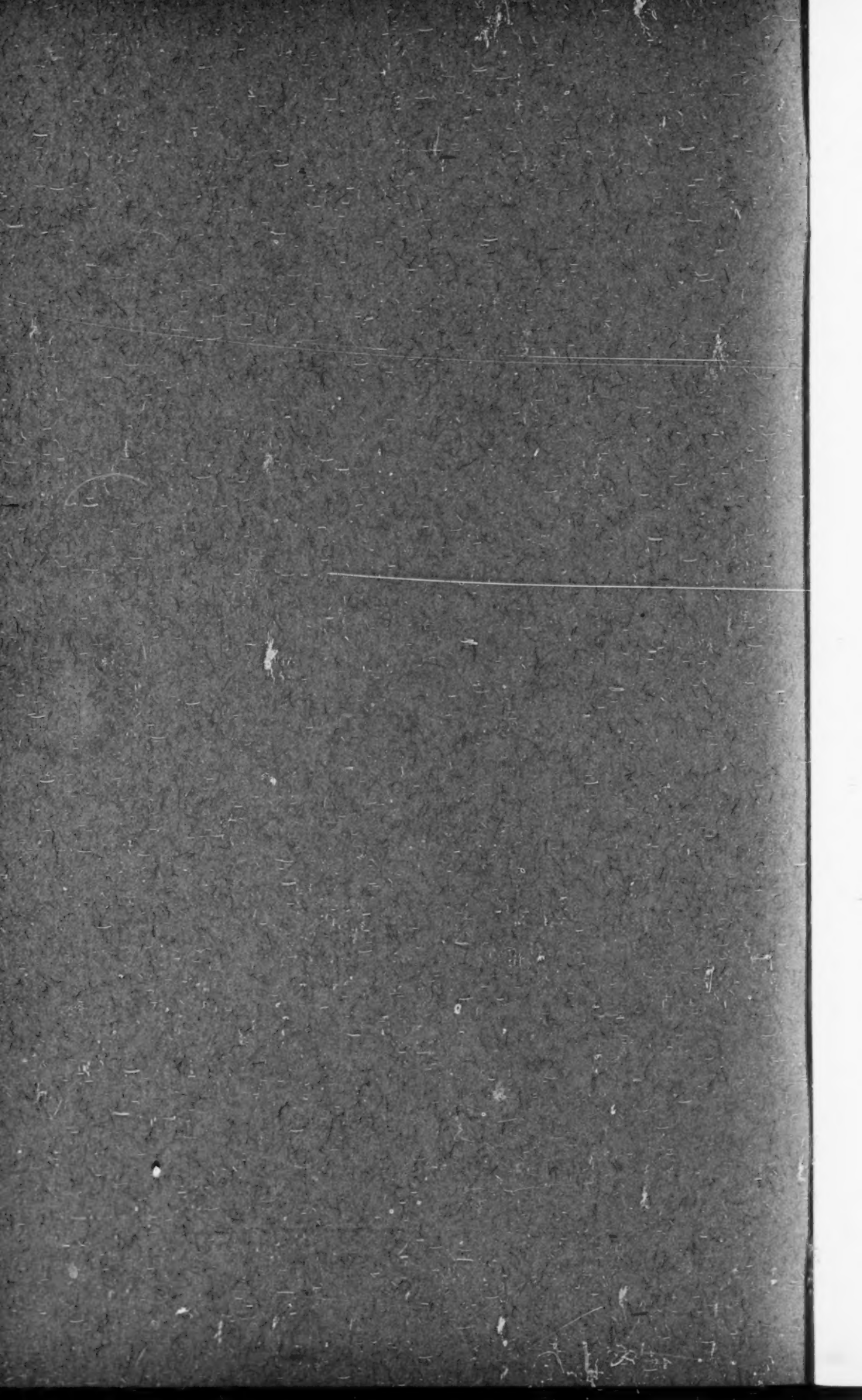
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QUESTIONS PRESENTED

1. Whether the United States is subject to liability under the Federal Tort Claims Act in circumstances in which the plaintiff's claim, if asserted against a private employer, would be barred by the Maryland workmen's compensation statute.

2. Whether the immunity recognized in *Barr v. Matteo*, 360 U.S. 564 (1959), protects the individual respondents—federal employees sued in their individual capacities—from liability under state tort law for injuries allegedly caused by their official acts.



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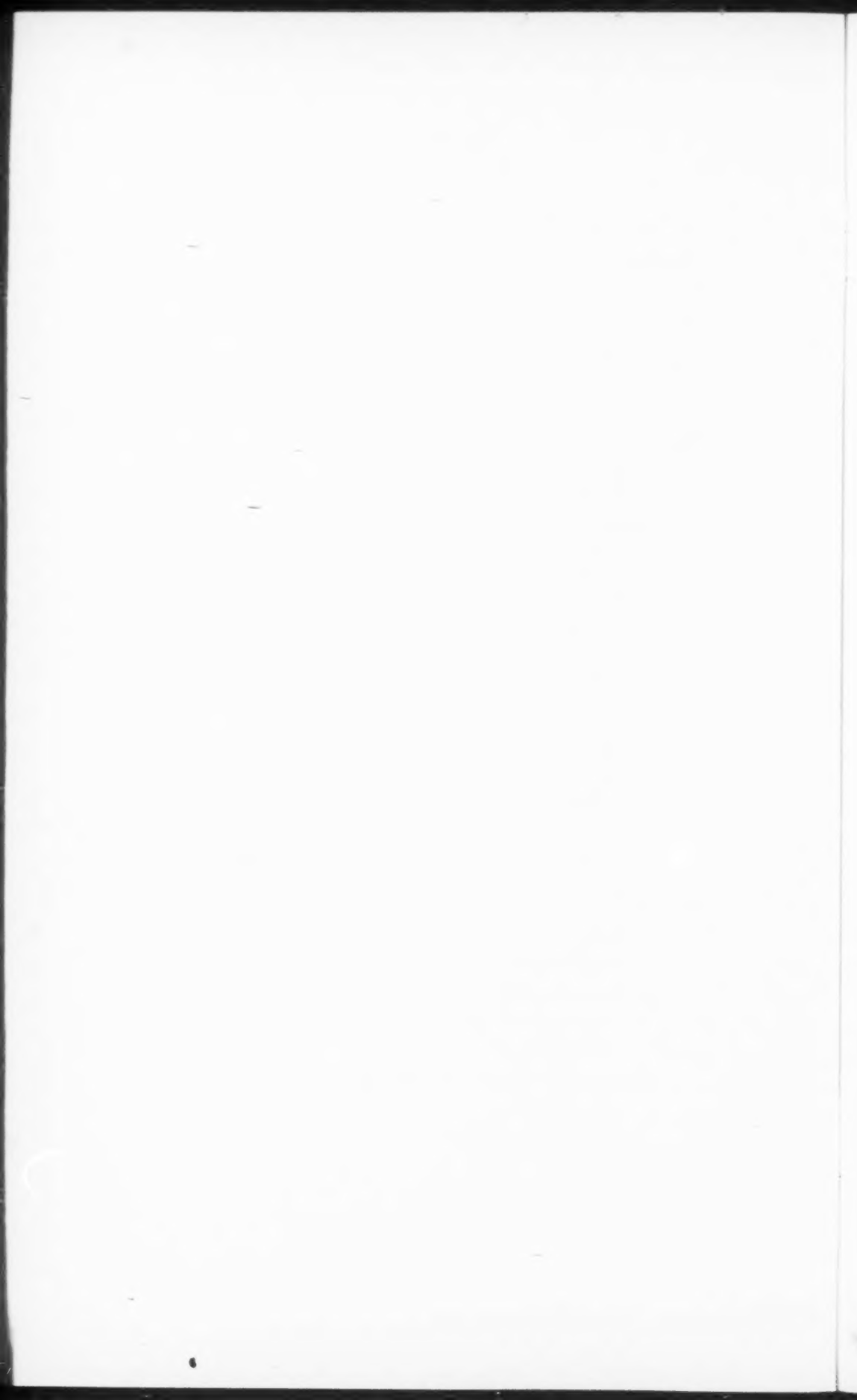
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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 813 F.2d 1273. The opinion of the district court on the motion to dismiss (Pet. App. A16-A27) is reported at 603 F. Supp. 88. The opinion of the district court on the motion for summary judgment (Pet. App. A28-A42) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A44) was entered on March 12, 1987. The petition for a writ of certiorari was filed on June 9, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On July 27, 1982, James Layman and Lloyd Thompson, high voltage electricians employed by the National Institutes of Health (NIH), were assigned to replace

burned out transistors in a transformer designed and manufactured by petitioner. While Layman and Thompson were working on the transformer, a short circuit caused a surge of current that injured both men. Thompson subsequently died from his injuries; Layman survived but the injuries that he suffered were permanent. Because both men had been injured in the course of their employment by the federal government, they became entitled to benefits under the Federal Employees' Compensation Act (FECA), 5 U.S.C. (& Supp. III) 8101-8151. Pet. App. A2, A16.

Layman and his wife, together with Thompson's surviving spouse, commenced a tort action against petitioner alleging that petitioner had designed its transformer in a defective manner. Petitioner settled that lawsuit and then brought the present action seeking indemnity or contribution from the United States, pursuant to the Federal Tort Claims Act, and from five NIH employees in their individual capacities, pursuant to state law. Petitioner alleged that the United States and the individual respondents, who are NIH supervisors and administrators, failed to exercise due care with respect to the safety of Layman and Thompson and that the injuries incurred by the two men were a direct result of that negligence. Pet. App. A3, A17-A18.

The district court dismissed petitioner's claim against the federal government (Pet. App. A16-A25). The court observed that the United States is subject to liability under the Federal Tort Claims Act for the negligence of its employees " 'under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.' " Pet. App. A18, quoting 28 U.S.C. 1346(b). Under Maryland law, which applies in the present case, an employer's liability under the state workmen's compensation statute is exclusive; even if the employee

recovers damages from a third party, the employer is not liable to the third party in contribution or indemnity. The court stated (Pet. App. A24 (footnote omitted)) that

[i]n all practical ways, the law of Maryland envisions that a private person who conforms to the Act by obtaining workmen's compensation insurance to cover his employees injured on the job shall be shielded from common law liability to the employee and liability to third parties on indemnity and contribution claims. In fact, private employers from outside the state are provided with the shield of immunity, in certain circumstances, if the out-of-state workman's compensation scheme covers the non-resident employee injured while on the job in Maryland.

The court concluded that the United States was similarly immune from liability because it "stands in the shoes of those private persons shielded by the Maryland Workman's Compensation Act from direct actions and third party actions for contribution and indemnity" (*id.* at A25).¹

The district court subsequently granted the individual respondents' motion for summary judgment (Pet. App. A28-A42). It stated that "[t]he immunity of a government official from civil suits extends to the 'outer perimeter' of his or her 'line of duty.'" *Id.* at A30 (quoting *Barr v. Matteo*, 360 U.S. 564, 575 (1959)) (plurality opinion). The court found that "the negligence alleged to have been committed occurred within the scope of [the individual respondents'] government employment," and that the individual respondents were therefore entitled to immunity (Pet. App. A41).

¹ The court declined to grant the individual respondents' motion to dismiss because the allegations of the complaint did not supply enough information to ascertain the nature of the duties performed by the individual respondents. See Pet. App. A25-A26.

2. The court of appeals unanimously affirmed the district court's determinations (Pet. App. A1-A13). With respect to the government's liability, the court of appeals observed that the government had complied with the Federal Employees' Compensation Act, "the federal law that provides workers' compensation to federal employees" just as "a private employer 'in like circumstances' would have complied with the Maryland Workers' Compensation statute" (*id.* at A5). It further stated that "[a] private employer that had contributed to the Maryland Worker's Compensation program would be entitled to invoke the exclusivity provision of that statute to bar third-party claims for contribution and/or indemnity like that advanced by" petitioner (*ibid.*). Because "a similarly situated private employer would be immune from common law damage suits arising out of injuries negligently inflicted on its employees," the United States, which complied with "the applicable worker's compensation law, FECA, is entitled to claim the same immunity" (*id.* at A6 (footnote omitted)). "To hold otherwise," the court stated, "would be to place the United States in a position less favorable than that of any private employer under the Maryland Statute" (*id.* at A6-A7).

The court of appeals also concluded that the district court had properly held that the individual defendants were entitled to immunity. The court of appeals stated that "[w]here no constitutional tort is alleged, the defendant [federal] official is absolutely immune from suits based on common-law torts, provided that the alleged tort was an action within the outer perimeter of the official's line of duty" (Pet. App. A12). Because the actions challenged in this case were within the individual respondents' official duties, those respondents were entitled to official immunity (*ibid.*).

ARGUMENT

1. Petitioner contends (Pet. 6-10) that the court of appeals erred by concluding that the United States was not subject to liability under the Federal Tort Claims Act. The court of appeals' decision with respect to this issue is correct and does not conflict with any decision of this Court or another court of appeals. Further review by this Court is not warranted.

The Tort Claims Act waives the sovereign immunity of the United States with respect to actions seeking damages for "personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant" under the law of the State where the act or omission occurred. 28 U.S.C. 1346(b); see also 28 U.S.C. 2674 (United States "shall be liable * * * in the same manner and to the same extent as a private individual under like circumstances"). Under Maryland law, which is the relevant state law in this case, an employee who receives benefits under the state workmen's compensation statute for an employment-related injury may not sue his employer for damages relating to the same injury. And, while the employee may bring such a damage action against third parties, those third parties are barred from seeking contribution or indemnity from the employer. Md. Ann. Code art. 101, § 15 (1985); see also *Mason v. Callas Contractors, Inc.*, 494 F. Supp. 782, 784 (D. Md. 1980), citing *Baltimore Transit Co. v. State*, 183 Md. 674, 39 A.2d 858 (1944); *American Radiator & Standard Sanitary Corp. v. Mark Engineering Co.*, 230 Md. 584, 187 A.2d 864 (1962).

Petitioner asserts that the United States is not entitled to invoke the protection of this provision because it is not an employer covered by the Maryland statute. See Md. Ann. Code. art. 101, § 21(c)(3) (1985) (exempting persons "for

whom a rule of liability for injury or death is provided by the laws of the United States"). But the Tort Claims Act provides that the government's liability is determined by analogizing its position to that of a private person under "like circumstances." Because a private employer who pays workmen's compensation benefits to an employee is immune from liability in tort under Maryland law, the government is entitled to the same immunity where it has provided an employee with equivalent benefits. Pet. App. A4-A7.² Thus, the other courts of appeals that have considered this question have concluded that where a third-party claim seeks contribution or indemnity for damages awarded to an injured employee who has received FECA benefits, the federal government's liability under the Tort Claims Act is the same as that of a private employer under the state workmen's compensation statute, even though the state statute does not by its terms encompass claims against the United States. *LaBarge v. Mariposa County*, 798 F.2d 364, 369 (9th Cir. 1986), cert. denied, No. 86-1239 (Apr. 20, 1987); *In re All Maine Asbestos Litigation*, 772 F.2d 1023, 1028 (1st Cir. 1985), cert. denied, No. 85-1246 (May 19, 1986); cf. *Griffin v. United States*, 644 F.2d 846 (10th Cir. 1981); *Roelofs v. United States*, 501 F.2d 87 (5th Cir. 1974), cert. denied, 423 U.S. 830 (1975).³

² It is noteworthy that petitioner does not contend that the government activity in which Layman and Thompson were employed falls within any of the other exemptions contained in the Maryland statute.

³ Petitioner errs (Pet. 10) in suggesting that *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190 (1983), controls this case. The Court there held that the exclusive remedy provision of the Federal Employees' Compensation Act does not bar a third-party action against the United States for contribution or indemnity. *Lockheed Aircraft Corp.* did not address the applicability of any state workmen's compensation statute to such claims against the United States, much less consider the scope of the Maryland statute which has been held by that state's highest court to bar a third-party action for contribution or indemnity.

2. The second question presented in this case is the same as the issue now before the Court in *Westfall v. Erwin*, No. 86-714; *i.e.*, whether a federal employee is subject to personal liability under state law for his official acts.⁴ The court of appeals in the present case concluded that a federal employee is "absolutely immune from suits based on common-law torts, provided that the alleged tort was an action within the outer perimeter of the official's line of duty" (Pet. App. A12).

We argue in our brief in *Westfall* (at 8-48), that a federal employee is immune from liability under state tort law when the conduct that forms the basis of the tort claim falls within the scope of the employee's official duties, at least where those duties involve the exercise of a minimal quantum of discretion.⁵ Here, as in *Westfall* (Br. 47-48), the individual federal employees are entitled to immunity under this standard. These employees' planning, supervisory, and safety duties (see Pet. App. A37-A40) plainly require them to make a variety of sensitive judgments in determining whether to undertake particular projects and generally supervising the employees under their authority. With respect to this question, therefore, the Court should hold the petition for a writ of certiorari pending its decision in *Westfall*.

⁴ We have served counsel for petitioner with a copy of our brief in *Westfall*.

⁵ We noted that this Court also has in some circumstances extended immunity to employees performing ministerial duties (see Br. 12-13 & n.10).

CONCLUSION

As to Question 2, the Court should hold the petition for a writ of certiorari and dispose of it as appropriate in light of the disposition of *Westfall v. Erwin*, No. 86-714. In all other respects, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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